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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FEDERAL TRADE COMMISSION and
UTAH DIVISION OF CONSUMER
PROTECTION,

Plaintiffs,

v.

ZURIXX, LLC, *et al.*

Defendants.

**FTC’S MEMORANDUM OF LAW ON
THE RECENT SUPREME COURT
RULING ON EQUITABLE MONETARY
RELIEF UNDER SECTION 13(b) OF
THE FTC ACT**

Case No. 2:19-cv-00713-DAK-DAO

District Judge Dale A. Kimball
Magistrate Judge Daphne A. Oberg

The Federal Trade Commission (“FTC”) submits this memorandum pursuant to the Court’s order that all parties “submit briefing by May 28, 2021, discussing how the *AMG* ruling impacts and applies to their respective case(s).” ECF 241. In *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341, 1352 (2021), the Supreme Court held that “§ 13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief.”

AMG has limited impact on *this case* because it has not changed the law on substantive liability, the scope of conduct relief, or most critically, the availability of monetary or other forms of relief for violations of the Telemarketing Sales Rule (“TSR”) and the applicable Utah statutes. *AMG* has left undisturbed all fourteen counts of the Second Amended Complaint (“SAC”) and all forms of relief except one—equitable monetary relief under Section 13(b) of the FTC Act. Defendants’ deceptive telemarketing caused substantial harm to consumers, and the FTC may continue to pursue its claims for monetary redress for Defendants’ TSR violations.¹ Defendants’ telesales business was substantial, selling more than \$68.2 million in coaching sessions and other real estate related products between October 2016 and October 2019 through telemarketing.² That amount greatly exceeds the funds currently preserved by the Court for potential consumer redress.³

The Court previously anticipated the minimal practical impact of *AMG* on this case. In denying Defendants’ most recent Motion to Stay, this Court found that “[t]his is not a case where

¹ *AMG* does not render the Stipulated Preliminary Injunction “unlawful or unnecessary” as Defendants assert in their Motion to Modify the Preliminary Injunction (ECF 244). Plaintiffs will address more fully the Defendants’ arguments to dissolve the receivership and asset freeze in their forthcoming Oppositions to Defendants’ Motion to Modify the Stipulated Preliminary Injunction.

² Declaration of the Receiver’s Accountant, Gil A. Miller, filed in ancillary case, Broadbent v. Davis, Case No. 2:20-cv-00545 on May 28, 2021.

³ The Receiver currently holds less than \$7.3 million in funds. ECF 176, at 5 (Receiver’s Report) Defendants have provided financial disclosures self-reporting approximately \$24.3 million in combined assets, with approximately \$5.7 million in liabilities. ECF 71-2, at 11-14 (accounting report).

the action will be mooted by the Supreme Court decision.” ECF 205, at 10.⁴ “Defendants face significant financial exposure under Section 19 of the FTC Act because it allegedly sold more than \$136 million in coaching sessions and other real estate products via telemarketing. Section 19 is not at issue in *AMG*. The Utah state law claims likewise give rise to substantial monetary liability.” *Id.* “And the Receiver’s ancillary lawsuits for alleged violations of Utah’s Voidable Transfer Act that are all pending before the court have nothing to do with the issue in *AMG* and should proceed.” *Id.* at 11-12. Accordingly, the only impact that *AMG* has on *this case* is to eliminate one ground for monetary relief, while all others remain. *AMG* has no impact whatsoever on the FTC’s ability to obtain monetary and other relief under Section 19(a)(1) and (b). Defendants’ potential monetary liability still greatly exceeds the funds preserved for potential consumer redress.

I. *AMG* Does Not Change the FTC Act’s Explicit Authorization of Injunctive Relief Under Section 13(b).

AMG affirmed the Court’s authority to grant non-monetary injunctive relief under Section 13(b) of the FTC Act. *AMG*, 141 S. Ct. at 1344. Quoting from the statutory language, the Court stated that “[s]ection 13(b) of the Federal Trade Commission Act authorizes the

⁴ This Court has heard extensive and repeated argument on the potential impact of a Supreme Court ruling barring equitable monetary relief under Section 13(b), but has thus far declined to dismiss or delay Plaintiffs’ pursuit of redress for consumers harmed by Defendants. *See, e.g.*, ECF 62 (Defendants’ Partial Motion to Dismiss), ECF 70 (Defendants’ Motion to Stay Discovery), ECF 72 (FTC’s Opposition to Defendants’ Partial Motion to Dismiss), ECF 76 (Divisions’ Opposition to Defendants’ Partial Motion to Dismiss), ECF 84 (Plaintiffs’ Opposition to Defendants’ Motion to Stay Discovery), ECF 86 (Defendants’ Reply); ECF 168 (Defendants’ Motion to Dismiss), ECF 169 (Defendants’ Motion to Stay), ECF 198, (Defendants’ Motion for Relief from the Stipulated Preliminary Injunction), ECF 205 (Order denying Defendants’ Motion to Stay and Motion for Relief from the Preliminary Injunction).

Commission to obtain, ‘in proper cases,’ a ‘permanent injunction’ in federal court against ‘any person, partnership, or corporation’ that it believes ‘is violating, or is about to violate, any provision of law’ that the Commission enforces.” *Id.* (quoting 15 U. S. C. § 53(b)). Therefore, Section 13(b) continues to authorize non-monetary injunctions such as conduct prohibitions and other non-monetary equitable relief to prevent reoccurrence of deceptive practices.

II. *AMG Does Not Change the FTC Act’s Explicit Authorization of Monetary and Other Relief for TSR Violations.*

Section 19(a)(1) of the FTC Act authorizes the FTC to bring suits in district court for rule violations, such as the TSR violations alleged in this case. 15 U.S.C. § 57b(a)(1).⁵ This explicit authorization is independent from Section 13(b). Section 19(a)(1) provides: “[i]f any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices . . . then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.” Section 19(b) empowers courts to remedy those rule violations, stating:

The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair

⁵ The FTC also brought suit under the Consumer Review Fairness Act (“CRFA”). Pursuant to Section 2(d)(1) of the CRFA, 15 U.S.C. § 45b(d)(1), a violation of Section 2(c) of the CRFA constitutes a violation of a rule promulgated under Section 18(a)(1)(B) of the FTC Act, 15 U.S.C. § 57a(1)(B), and therefore constitutes an unfair or deceptive act or practice in or affecting commerce in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

15 U.S.C. §57b(b).

Therefore, and as stated in the Complaint, Sections 19(a)(1) and 19(b), and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), “authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants’ violations of the TSR, including damages . . . and the refund of money.” SAC ¶ 209. *AMG* does not change the fact that Defendants still face significant financial exposure. The decision did nothing to alter Section 19(a)(1) and (b) through which the Court can order consumer redress and other relief for violations of the TSR.

III. Conclusion

As the Court correctly predicted, the *AMG* decision does not substantially change this case.

Respectfully submitted this 28th day of May, 2021.

/s/ Amanda Grier
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Certificate of Service

I HEREBY CERTIFY that on May 28, 2021, a true and correct copy of the foregoing document was served on counsel for all parties via electronic filing with the Court's ECF service.

/s/ Amanda Grier
Amanda Grier